UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA	***)***	
	)	
v.	***)***	***Criminal No. 91-75-P-C***
	)	***(Civil No. 96-333-P-C)***
ALLAN W. ST. GERMAINE,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR COLLATERAL RELIEF UNDER 28 U.S.C. § 2255

Allan W. St. Germaine moves this court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. St. Germaine was convicted of possessing a firearm in violation of 18 U.S.C. § 922(g)(1), the "felon-in-possession" law. The court determined that he was subject to sentence enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), which applies when a person who violates section 922(g)(1) has at least three previous convictions for a violent felony and/or serious drug offense. It is St. Germaine's contention that his criminal record, though extensive, lacked three offenses that meet the requirements of the ACCA, and that he suffered the ineffective assistance of counsel because of his trial attorney's failure to realize this and to take that position in connection with the sentencing. He also contends that his sentence is directly amenable to correction based on incorrect application of the ACCA.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because 'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (citation omitted). In

this instance, I find that the allegations of St. Germaine are insufficient to justify relief even if accepted as true, and accordingly I recommend that his motion be denied without an evidentiary hearing.

I. Background

The grand jury returned its indictment of St. Germaine on November 21, 1991. Indictment (Docket No. 1). The charging instrument alleged that St. Germaine violated the felon-in-possession statute by knowingly receiving and possessing a ten millimeter pistol at a time when he stood convicted of the following enumerated state-law offenses:

> 1. Possession of a Firearm By a Convicted Felon, in violation of Title 15, Maine Revised Statutes Annotated, Section 393(1), on or about March 12, 1990, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County, in Docket Number CR-89-715;
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> 2. Theft, in violation of Title 17-A, Maine Revised Statutes Annotated, Section 353, on or about March 12, 1990, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County, in Docket Number CR-89-715;
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> 3. Trafficking in a Scheduled Drug, in violation of Title 17-A, Maine Revised Statutes Annotated, Section 1103, on or about October 8, 1986, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County, in Docket Number CR-86-242;
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> 4. Theft, in violation of Title 17-A, Maine Revised Statutes Annotated, Section 353, on or about February 3, 1986, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County, in Docket Number CR-85-196;
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> 5. Possession of a Firearm By a Convicted Felon, in violation of Title 15, Maine Revised Statutes Annotated, Section 393(1), on or about October 2, 1985, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County, in Docket Number CR-84-477;
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> 6. Sale of An Hallucinogenic Drug, in violation of Title 22, Maine Revised

Statutes Annotated, Sections 2212-E and 2212-C, on or about September 9, 1976, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County, in Docket Number I-75-221;

7. Sale of Cannabis, in violation of Title 22, Maine Revised Statutes Annotated, Sections 2384 and 2212-C, on or about September 9, 1976, in the State of Maine Superior Court for Androscoggin, holden at Auburn in said County in Docket Number I-75-222;

8. Sale of An Hallucinogenic Drug in violation of Title 22, Maine Revised Statutes Annotated, Sections 2384 and 2212-C, on or about September 9, 1976, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County in Docket Number I-75-222;

9. Breaking And Entering With Intent to Commit Larceny in the Night-Time, in violation of Title 17, Maine Revised Statutes Annotated, Section 754, on or about June 18, 1976, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County in Docket Number I-76-21;

10. Breaking And Entering With Intent to Commit Larceny in the Night-Time, in violation of Title 17, Maine Revised Statutes Annotated, Section 754, on or about June 22, 1973, in the State of Maine Superior Court for Kennebec County, holden at Augusta in said County in Docket Number 5054;

11. Breaking And Entering With Intent to Commit Larceny, in violation of Title 17, Maine Revised Statutes Annotated, Section 2103, on or about June 11, 1970, in the State of Maine Superior Court for Androscoggin County, holden at Auburn in said County, in Docket Number 41-70.

Id. at 2-3. St. Germaine ultimately pleaded guilty, and the matter was thereafter the subject of a pre-sentencing conference with the court on October 28, 1992. Transcript of Proceedings ("Tr.") (Docket No. 20) at 1; *see also* Order (Docket No. 9) (directing preparation of competency study by Bureau of Prisons).

During the conference, the government and defense counsel agreed that if the court determined, pursuant to the ACCA, that St. Germaine was a career offender, this would fix his status under the Sentencing Guidelines such that his total adjusted Offense Level would be 31 and his

Criminal History Category would be VI. Tr. at 2. Counsel for the defendant then affirmatively indicated that he was withdrawing his previously asserted objection to the determination in the Presentence Report that St. Germaine was, in fact, a career criminal within the meaning of the ACCA. Tr. at 3-4. Defense counsel stated: "Yes, the record is clear, the convictions are valid on their face and unless a proceeding is initiated to expunge those convictions, the objection has no legal basis." *Id*.

The sentencing took place on November 3, 1992. *Id*. at 10-11. On that occasion, during the court's initial colloquy with St. Germaine, St. Germaine raised the issue of his status as a career criminal under the ACCA. *Id*. at 14. The court took a brief recess so St. Germaine could discuss the matter with his attorney. *Id*. at 15. After the recess, St. Germaine indicated to the court that he did not understand which of his prior convictions were being used to determine his career criminal status. *Id*. The court responded by taking St. Germaine through its calculations pursuant to the Guidelines, ultimately explaining that he was being sentenced under section 4B1.4(b)(B) of them. *Id*. at 16. The cited Guideline provision mandates an offense level of 33 for a defendant determined to be an armed career criminal pursuant to the ACCA, absent circumstances not at issue here. U.S. Sentencing Guidelines Manual § 4B1.4(b) (1992).[1] "I understand now," replied the defendant, but immediately went on to assert that he had not been given an opportunity to object to the list of prior convictions that were being used to determine his career offender status. Tr. at 17. His attorney thereupon indicated to the court that St. Germaine's objections related to his belief that some of the prior convictions were invalid. *Id*. at 18. The attorney told the court he had advised his client that

[1] The 1992 edition of the Sentencing Guidelines was effective on November 1, 1992. Its version of section 4B1.4 is identical to that in the 1991 edition.

he could not make such a challenge in the context of his federal sentencing, and that any such issues would have to be raised in a state-court post-conviction proceeding. *Id*. The court, assenting, asked St. Germaine if he understood the point his attorney was making, to which St. Germaine responded affirmatively. *Id*.

The colloquy between the court and St. Germaine continued. St. Germaine raised two specific issues regarding the propriety of using his prior convictions to deem him a career criminal. *Id*. at 19. Specifically, he mentioned that convictions prior to 1976 for sales of hallucinogens and marijuana did not carry potential ten-year sentences, and asserted that his theft convictions were also not properly included in the career criminal calculus. *Id*. The court asked St. Germaine if he had had an opportunity to discuss these concerns with his attorney and receive his legal advice about them, to which St. Germaine responded, "Yes, I have, to a certain degree. I haven't had an opportunity to really sit down and go over this portion, from what I found out lately." *Id*. at 20. The court responded by indicating it was "not satisfied" that this was so, and that St. Germaine had been advised fully by his attorney on the applicable issues. *Id*. The court then proceeded with the sentencing, applying section 4B1.4 of the Guidelines to determine a base Offense Level of 33, adjusted to 31 for acceptance of responsibility, with a Criminal History Category of VI. Id. at 28. This yielded an applicable sentencing range of 188 to 235 months, and the court imposed a period of incarceration at the low end of the range, followed by five years of supervised release. *Id*. at 28, 30.

The First Circuit affirmed the judgment on June 21, 1993 -- indicating in an unpublished *per curiam* opinion that the defendant had not preserved the issue of whether he was properly sentenced as a career criminal under the ACCA. *United States v. St. Germaine*, No. 92-2397, slip op. at 2 (1st

Cir. Jun. 21, 1993).[2] However, the appellate panel went on to stress that, in any event, it was "satisfied that appellant's prior criminal record brought him firmly within the ambit of the Armed Career Criminal Act." *Id.* (citations omitted). The instant motion was filed on November 14, 1996.

II. Discussion

St. Germaine presses two distinct grounds for post-conviction relief: (1) that he suffered the ineffective assistance of counsel based on his trial attorney's failure to argue that he was not a career criminal pursuant to the ACCA, and (2) that, because he was not a career criminal, the sentence as imposed is illegal.

In support of his position on ineffective assistance of counsel St. Germaine appropriately invokes the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. The *Strickland* test applies to cases that are resolved by guilty plea rather than trial. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In a case alleging ineffective assistance in connection purely with the sentencing phase of a criminal proceeding, the First Circuit has described the "prejudice" requirement as one demanding a showing of "a reasonable probability that, but for counsel's error,

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[2] The opinion of the First Circuit appears in the present record as Docket No. 21.

the result of the proceedings would have been different." *Smullen v. United States*, 94 F.3d 20, 23 (1st Cir. 1996).

The government's position is that St. Germaine cannot make the required showing of prejudice because, notwithstanding any errors made by trial counsel in applying the ACCA, St. Germaine is, in fact, a career criminal within the meaning of the statute and therefore properly sentenced. As the government points out, notwithstanding a deemed failure to preserve the issue the First Circuit resolved it unambiguously on direct appeal, and matters so determined cannot be revisited in connection with a collateral attack. *United States v. Butt*, 731 F.2d 75, 76 n.1 (1st Cir. 1984).

A subsequent development causes me, out of an abundance of caution, to explore and discuss the issue of St. Germaine's status as a career criminal under the ACCA. Well after its decision on St. Germaine's direct appeal, the First Circuit has had occasion to revise its view of precisely which prior convictions are properly considered as predicate crimes under the statute. In *United States v. Caron*, 77 F.3d 1 (1st Cir.) (en banc), *cert. denied*, 116 S.Ct. 2569 (1996), the court overruled its prior interpretation of the ACCA on an issue that St. Germaine raises here: the question of when a prior conviction cannot serve as a predicate crime under the ACCA because the defendant's civil rights had been restored. *Id*. at 1, 5. As I explain, *infra*, I conclude that St. Germaine was properly sentenced as a career criminal notwithstanding *Caron*. But I believe he is entitled to a full explanation of why this is so.

St. Germaine stands convicted of 18 U.S.C. § 922(g), which makes it unlawful for any person who, *inter alia*,

> has been convicted in any court of[] a crime punishable by imprisonment for a term

> exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g). He does not contest the fact that he committed the firearm offense set forth in this provision. The ACCA, in turn, provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

28 U.S.C. § 924(e)(1). In relevant part, the ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law. *Id*. at subparagraph (e)(2)(A)(ii). A "violent felony" for purposes of the ACCA is

> any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that --
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
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> . . . the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Id. at subparagraphs (e)(2)(B) and (C).

St. Germaine concedes that his prior conviction for trafficking in a scheduled drug meets the definition of "serious drug offense" set forth in the ACCA and was therefore properly considered a predicate crime for purposes of determining whether he was a career criminal. However, he takes the position that the other three drug offenses -- involving two convictions for sale of an hallucinogenic drug and one conviction for sale of cannabis -- are not properly so considered because none of these offenses carried a maximum sentence of at least ten years at the time of the crimes in question. He also maintains that these offenses were not "committed on occasions different from one another" as required by the ACCA. The government does not dispute any of these assertions, and I therefore must agree that these three prior drug offenses could not properly be regarded as predicate crimes for ACCA purposes.

Next, St. Germaine contends that his two prior convictions for possession of a firearm by a convicted felon and his two convictions for theft were properly excluded as predicate crimes because none is a "violent felony" as defined by the ACCA. Again, the government does not assert that these offenses are predicate crimes and I therefore adopt St. Germaine's position that they were properly excluded.

That leaves the two convictions for breaking and entering with intent to commit larceny in the night-time, and the conviction for breaking and entering with intent to commit larceny. The former convictions date from 1976, the latter from 1970. It appears that the 1970 case was a juvenile adjudication but, as the government points out, that fact does not automatically exclude the conviction from being deemed a predicate crime. St. Germaine's position that all three larceny convictions must be excluded is based on an additional statutory provision not yet discussed herein, *viz*:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of [the ACCA and the felon-in-possession statute], unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20). For purposes of this provision, civil rights "generally encompass the right to vote, the right to seek and hold public office, and the right to serve on a jury." *United States v. Sullivan*, 98 F.3d 686, 689 (1st Cir. 1996) (citation and internal quotation marks omitted).

This "civil rights restored" exception to the ACCA was the subject of the First Circuit's opinion in *Caron*. Specifically, the court held that the process of restoring civil rights for purposes of section 921(a)(20) "need not be focused or individualized" and, therefore, that a convicted person may have his civil rights restored for purposes of ACCA determinations through the operation of a statute of general application. *Caron*, 77 F.3d at 4. As I have already noted, this marked a departure from a prior First Circuit decision. *Id*. at 5. The court also held in *Caron* that a defendant's civil rights had been restored for purposes of subparagraph 921(a)(20) when he regained the right to sit on a jury and to hold public office.[3] *Id*. at 6.

In light of *Caron*, St. Germaine's position is that the three larceny convictions are not properly considered predicate crimes because his civil rights were restored to him within the meaning of subsection 921(a)(20), through the operation of Maine statutes of general application. Indeed, the First Circuit has recently pointed out that, between 1975 and 1981, Maine reversed its prior course and enacted statutes restoring the applicable civil rights to felons. *Sullivan*, 98 F.3d at 689.

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[3] The First Circuit took a further step in *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996), determining that when a state law never deprived a defendant of his civil rights in the first place they are deemed to have been "restored" within the meaning of section 922(a)(2). *Id*. at 631.

However, the *Sullivan* court found it unnecessary to build upon *Caron* and decide whether, in light of the 1975 enactments, such civil rights can be deemed to have been restored to a felon convicted under Maine law. The reason was that section 921(a)(20) "provides that a conviction may serve as a predicate offense under the ACCA notwithstanding the restoration of civil rights theretofore forfeited if the restoration statute imposes a restriction on the felon's ability to possess a firearm." *Id*. (citation omitted).

Addressing this aspect of section 921(a)(20), St. Germaine draws the court's attention to Maine's statute regulating the possession of firearms by convicted felons, as it has evolved from the time of these convictions to the present. It is codified as 15 M.R.S.A. § 393. From 1965 through 1977, this provision read in relevant part as follows:

> It shall be unlawful for any person who has been convicted of a felony under the laws of the United States or of the State of Maine, or of any other state, to have in his possession any pistol, revolver or any other firearm capable of being concealed upon the person until the expiration of five years from the date of his discharge or release from prison or termination of probation. Such a person convicted of any offense, except misdemeanors, the maximum punishment for which is a fine of $100 or less, or imprisonment for 90 days or less, during the 5-year period, shall be forever barred from having in his actual or constructive possession any of the weapons described herein.

P.L. 1965, ch. 327, § 2. I take note of the fact that this deprivation of the right to bear arms was not indefinite (absent further felony convictions within five years of discharge or release), and applied only to weapons capable of concealment. I also note that, although section 393 is not itself explicitly a "restoration statute" for purposes of the ACCA, I must follow the teaching of *Sullivan* and therefore conclude that section 393 should be read in conjunction with the restoration statutes subsequently enacted. *Sullivan*, 98 F.3d at 689. Therefore, as to the period of 1965 to 1977, any Maine law that may have operated to restore St. Germaine's civil rights still expressly provided that

he could not possess at least some firearms for five years after the completion of his sentence.

Maine law has grown only more restrictive thereafter. In 1977 section 393 was amended such that persons convicted of a crime punishable by imprisonment of a year or more could never carry a concealed weapon, and could only receive a license to carry other firearms after five years and with the permission of the Commissioner of Public Safety. P.L. 1977, chs. 225, 564. That remains the state of section 393 today, with the added proviso that certain juvenile offenses -- i.e., those involving bodily injury or threat thereof -- are sufficient to invoke its restrictions on firearm possession, and that other juvenile offenses would involve a limited prohibition on firearms possession. 15 M.R.S.A. § 393(1), (1-A) and (2); *see also* 25 M.R.S.A. § 2001 (providing that no person may carry a concealed weapon except by permit). As the government points out, St. Germaine does not contend that he ever sought the permit described in any of the amended versions of section 393. Even if he had, his right to carry a firearm would still exclude the right to bear a concealed weapon, at least as to the two adult larceny convictions. Therefore, in any circumstances, any restoration of civil rights accorded to St. Germaine under Maine law as to his two adult larceny convictions would still expressly provide that he could not possess at least some firearms.

The First Circuit has recently decided a similar case, *United States v. Estrella*, 1997 WL 3286 (1st Cir. Jan. 9, 1997). In that proceeding, a direct appeal of a conviction under the felon-in-possession statute, the defendant's civil rights had been restored by operation of Massachusetts law, which also provided that he could obtain a Massachusetts firearm identification card five years after his release from custody. *Id*. at *5. Upon receipt of such a card, the defendant could possess a handgun in his residence or place of business, or a rifle or long-barrel shotgun anywhere. *Id*. However, the applicable state law still provided that the defendant, as a convicted felon, could not

possess a handgun anywhere else, could not purchase, rent or lease a handgun, and could not sell, rent or lease any firearms to another person. *Id*. Conceding that Congress, in drafting section 921(a)(20), may not have considered the situation in which an ex-felon's right to possess firearms was not fully restored, and noting some diversity of approaches to this problem in other circuits, the First Circuit nevertheless determined that the restrictions imposed by Massachusetts law were sufficient to be deemed an express provision that he may not ship, transport, possess or receive firearms. *Id*. at *5-*6. "In the future, there might be close cases where, for example, some other state's restriction is arguably de minimis; but an ordinary Massachusetts felon will not be exempted from the federal ban." *Id*. at *6.

Estrella is controlling here. By virtue of his two adult larceny convictions, he may not carry a concealed weapon -- a restriction that is not de minimis. While perhaps less more limited than the restrictions imposed in Massachusetts, this is still a substantial limitation of a right that other Maine citizens enjoy. Accordingly, notwithstanding the exception set forth in section 921(a)(20), these two convictions could properly be counted as predicate crimes for purposes of sentencing St. Germaine as a career criminal.

The inexorable result is that St. Germaine's previous criminal record contains the necessary three predicate crimes to make him a career criminal for purposes of the ACCA. It follows that he cannot demonstrate the necessary prejudice to sustain a claim of ineffective assistance of counsel, notwithstanding any errors that may have been made by his attorney. Given that St. Germaine is, in fact, a career criminal as that term is defined in the ACCA, it also follows that the sentence imposed was not illegal.

III. Conclusion

For the foregoing reasons, I recommend that the petitioner's motion to vacate, set aside or correct his sentence be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of February, 1997.

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David M. Cohen
United States Magistrate Judge